

# Foreword

In the Foreword to the last issue (May 2006 – there was no ‘November’ issue last year) I gave an assurance that the proposed amendments to the Mental Health Act 1983 would be considered in ‘the next issue’. I am delighted that that assurance is being honoured within the following pages. Throughout, readers will encounter numerous reflections on, and considerations of, the contents of the Mental Health Bill 2006 (‘the Bill’) published in November 2006.

However as readers will be well aware, the Bill has had a torrid time as it makes its way through the parliamentary process. Numerous amendments were proposed and passed in the Lords (where the Bill commenced its passage), only to face determined Government resistance<sup>1</sup> once it came to the Commons. As this issue goes to press, it seems probable that parliamentary ‘ping-pong’ between the two chambers will continue during the remainder of the parliamentary session, and the final form of the Bill is far from clear. As I’ve bemoaned in previous Forewords, the uncertainty and the forever-changing picture causes problems for contributors, not to mention considerable stress for the editor. The worrying question faced is ‘Will the article contain out-of-date material by the time the issue is published?’. As in previous issues, we have tried to pre-empt (and indeed prevent) confusion for the reader. We have tried to be as up-to-date as possible, and we have made every effort to ensure the reader knows the date the article was written, alternatively accepted for publication.

We start off this issue with the question posed by Brenda Hale when she gave the keynote address at the third North East Mental Health Law Conference<sup>2</sup> held in Newcastle upon Tyne on 16th June 2006 – ‘**The Human Rights Act and Mental Health Law: has it helped?**’. Those who heard, or have read, Lady Hale’s widely acclaimed Paul Sieghart Memorial Lecture delivered in the summer of 2004 for the British Institute of Human Rights (‘What can the Human Rights Act do for my mental health?’<sup>3</sup>), will be very interested to read and consider her subsequent thoughts. We are extremely grateful to Lady Hale for finding the time to amend the text of her address in the light of the provisions of the Bill.

Another speaker at the June 2006 Conference was Gordon Ashton, Deputy Master of the Court of Protection. He too asked a question – ‘**Will the new Court of Protection damage your mental health?**’. Professor Ashton is of course eminently qualified to consider the question posed – after all for many years he has been at the forefront of the debate about the appropriate legal framework for decision-making in respect of those unable to make decisions for themselves – but as he himself acknowledges in the text which he has revised for this issue of the JMHL, it is a question which cannot yet be confidently answered. Professor Ashton poses a number of questions about the revamped Court, which will be operational from 1st October 2007, the delayed implementation date of most of the provisions of the Mental Capacity Act 2005 (‘MCA 2005’).<sup>4</sup>

Considerable interest and debate has been generated by the provisions of Clause 38 of the Bill. It is this clause which will amend the MCA 2005 to provide for ‘authorisation procedures’ in respect of the ‘Bournewood’ patient. As solicitor for Mr. L throughout the lengthy journey from High Court to Strasbourg<sup>5</sup>, Robert Robinson is of course ideally placed to reflect on how the Government aims to plug the ‘Bournewood’ gap. In his article ‘**Amending the Mental Capacity Act 2005 to provide for**

1 For evidence of the extent of Government opposition to the amendments passed in the House of Lords, one need look no further than the speech delivered by Ms. Rosie Winterton, Minister of State for Health Services, to the Local Government Association Conference, Mental Health Bill, 1st March 2007.

2 The fourth N.E. M.H. Law Conference is to be held in Newcastle on 16th November 2007.

3 Reproduced in JMHL May 2005 pp 7 – 16.

4 ‘The Mental Capacity Act 2005’. Gateway reference 7890. Department of Health (22/2/07).

5 HL v United Kingdom (2005) 40 EHRR case no. 32

**deprivation of liberty**', Mr. Robinson is critical of what is intended. He fears that 'an unnecessarily complex and costly detention regime' is in danger of being created 'with little discernible benefit to the people whose interest it is intended to protect'.

In the next article, Chris Heginbotham and Mat Kinton (the Chief Executive and the Senior Policy Analyst of the Mental Health Act Commission respectively) take the opportunity of reconsidering **'Developing a capacity test for compulsion in mental health law'**. In view of the fate of the Richardson Committee's Report of 1999<sup>6</sup> – in which 'capacity' sat at the heart of the Committee's proposals for reform of mental health law – it is reasonable to ask why. The answer lies in the first paragraph of their article – "For England and Wales, the proposal to introduce a threshold requirement of 'impaired decision-making' into the criteria for detention under sections 2 and 3 of the Mental Health Act 1983 was the first amendment to be voted upon in the House of Lords' reading of the Mental Health Bill ... Government lost the vote by a wide margin...". The issue of 'capacity' as a threshold test for compulsion continues to be attractive to some – and the fresh look by Professor Heginbotham and Mr. Kinton is therefore to be welcomed.

Another issue which has been central to the whole debate about mental health law reform (much too much so in the eyes of many) has been the 'Michael Stone question'<sup>7</sup>. Robert Francis QC chaired the Inquiry established to consider the events surrounding the killing in July 1996 of Lin Russell and her daughter, Megan, and the assault on her other daughter, Josie. Last summer Michael Stone, the man convicted of these horrific crimes, finally failed in his attempt to stop the Inquiry Report being published<sup>8</sup>. Earlier this year Mr. Francis kindly accepted the invitation extended to him, and has submitted **'The Michael Stone Inquiry – a Reflection'**. He provides an interesting insight into what occurred, and helpfully reflects on the respective roles of the criminal justice system and mental health services.

We then come to three articles which focus clearly on the Bill. Lord Patel has played a significant role in the House of Lords debate on the Bill. He asks **'A Nasty Act?'**. As Chairman of the Mental Health Act Commission, his views warrant particularly careful consideration. His support for the Lords amendments, his view that the amended Mental Health Act should be 'principled legislation' and his commitment to 'the least restrictive option' are all explained within his article. David Hewitt, Visiting Fellow at Northumbria University, also considers the Bill. In his typically meticulous way, Dr. Hewitt in **'Reconsidering the Mental Health Bill: the view of the Parliamentary Human Rights Committee'** analyses the scrutiny devoted to the Bill by the Parliamentary Joint Committee on Human Rights in their report published in February 2007<sup>9</sup>. Given that (in Dr. Hewitt's words) the report "is not the easiest of reads", he has done us a valuable service. His conclusions on the possible effects of the Committee's work should perhaps be considered when answering the question posed by Lady Hale in the opening article of this issue. The third article which focuses exclusively on the Bill, concerns the role (and the name) of the Approved Social Worker. Roger Hargreaves, a former ASW and the 'lead' on the Bill for the British Association of Social Workers, considers **'The Mental Health Bill 2006 – [from a] social work perspective'**. In his wide-ranging article, Mr. Hargreaves makes abundantly clear the primary concerns of his profession. He urges that the Government address these concerns, and concludes that "ultimately it has no choice but [to do so] if it wishes to ensure that the civil procedures of the amended Act will continue to be administered as effectively by AMHPs [Approved Mental Health Professionals] as they have been by ASWs for the past 24 years".

6 The Report of Expert Committee, 'Review of the Mental Health Act 1983' was published by the Department of Health in November 1999. The Government's Green Paper 'Reform of the Mental Health Act 1983' was published at the same time, and made clear its rejection of the Committee's capacity-based approach.

7 The expression adopted by Lord Carlile of Berriew in the

House of Lords debate of 12th June 2006. See footnote 8 in Robert Francis's article.

8 R (on the application of Stone) v South East Coast Strategic Health Authority and others [2006] EWHC 1668 (Admin)

9 HL Paper 40, HC 288, 4th February 2007

In October 2005, the Law School at Northumbria University hosted a 'Comparative Mental Health Law Seminar'. Professor Warren Brookbanks from the Law School at the University of Auckland, New Zealand was one of the speakers. Since then he has revised the paper delivered at that event. '**Sexual predators, extended supervision and preventive social control: Risk management under the spotlight**' takes as its starting-point recent New Zealand legislation, the Parole (Extended Supervision) Amendment Act 2004. He proceeds to a critical analysis of "the legitimacy of this model of preventive detention in the light of the legislative response to sex offenders in other jurisdictions, notably the United States and England". It is a statement of the obvious, but surely needs to be constantly re-stated – much can be learned by looking across to other jurisdictions<sup>10</sup>.

We end the issue as usual with some case reviews and book reviews.

The consideration given by Mr. Justice Munby to the question as to whether or not someone is 'deprived of [their] liberty' is referred to both by Robert Robinson and David Hewitt in their articles. The case in which the question was asked is *JE v DE* (by his litigation friend the official Solicitor) (1) *Surrey County Council* (2) *EW* (3)<sup>11</sup>, heard in the Family Division of the High Court on 29/12/06. In '**Two steps forward, one step back**' Lucy Scott-Moncrieff (solicitor) welcomes the approach taken by the Judge, before proceeding to express her concerns about the problems she foresees as arising from the proposed amendments to the MCA 2005<sup>12</sup>. She suggests that the case "displays the problems .... in all their grisly inadequacy".

The other case reviewed is the 2007 Court of Appeal decision in *Mersey Care NHS Trust v Ackroyd*<sup>13</sup>. John Anderson (solicitor) provides a critical review of this decision, the latest (and presumably the last) in the long-running saga involving the leaking of confidential information to the Press from Ashworth High Security Hospital. The review's title '**'Sunlight [as] the best of disinfectants'?**' will no doubt intrigue and entice readers – as is intended.

We draw readers' attention to two books. Michael Konstam (barrister) welcomes '**Mental Disability and the European Convention on Human Rights**'<sup>14</sup> by Peter Bartlett, Oliver Lewis and Oliver Thorold, whilst Simon Foster (solicitor) considers '**The Approved Social Worker's Guide to Mental Health Law**'<sup>15</sup> by Robert Brown.

There are two clear omissions from the contents of this issue, one or both of which may have been spotted by the eagle-eyed reader. Firstly Part 2 of Kay Wheat's consideration of 'Mental Health in the Workplace' is not included despite being flagged up in the last issue (when Part 1 was published<sup>16</sup>). Secondly there is no article focussing closely on the controversial provisions within the Bill for supervised community treatment/community treatment orders, despite one being intended (by Kris Gledhill (barrister)). Their absence is not the fault of either author, but simply because of an editorial decision to hold them over to the November issue. An assurance is given that both will appear then.

As ever, sincere thanks must go to those who have so generously contributed to this issue of the JMHL. I also take the opportunity of (a) welcoming Dr. George Szmukler (Institute of Psychiatry) to the Editorial Board, and (b) thanking David Hewitt (solicitor, Hemptons) and Mat Kinton (Mental Health Act Commission) for sharing editorial responsibility for this issue (and hopefully, for many issues in the future).

## John Horne

Editor

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10 It is hoped that the November 2007 issue will contain a number of articles which consider jurisdictions other than that of England and Wales.

11 [2006] EWHC Fam 3459

12 See Clause 38 Mental Health Bill 2006

13 [2007] EWCA Civ 101

14 Martinus Nijhoff (2006)

15 Learning Matters (2006)

16 JMHL May 2006 pp 53–65